

## Agency for International Development

## § 212.36

are likely to exceed \$250, USAID will require a requester to make an advance payment of the entire estimated charges before continuing to process the request. Where the estimated charges are in the \$25-\$250 range, then USAID in its discretion, before processing the request, may require either—

(1) An advance deposit of the entire estimated charges or (2) Written confirmation of the requester's willingness, when billed, to pay such charges.

(e) *Waiving or reducing fee.* In accordance with section (4)(A)(ii) of the FOIA, the Agency will furnish documents without charge or at reduced charges if disclosure of the information is "in the public interest" in that such disclosure is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. A requester may at any time, up to a period not to exceed thirty days from the final USAID decision concerning his/her request, request such waiver or reduction of fee by letter addressed to the Chief, Customer Outreach and Oversight Staff; such request shall address the above criteria for waiver. Such request will initially be decided by the Chief, Customer Outreach and Oversight Staff, or his/her designee; such decision will normally be made, and the requester so advised, within ten working days of its receipt. The requester, if dissatisfied with that decision, may appeal pursuant to the same procedures as apply under § 212.36 and § 212.37 of this part.

(f) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the FOIA, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together so that, except for commercial use requesters, the Agency will not begin to assess fees until it has provided such free search and reproduction. For example, for a request that

involved two hours and ten minutes of search time and resulted in 105 pages of documents, the Agency will determine the cost of only ten minutes of search time and only five pages of reproduction. If this cost is equal to or less than the cost of processing the payment instrument—a figure which the Agency will from time to time review and determine—then there will be no charge to the requester.

(g) *Other provisions—*(1) *Charges for unsuccessful search.* The Agency will assess charges for time spent searching even if the Agency fails to locate the records or if records located are determined to be exempt from disclosure.

(2) *Aggregating requesters.* When the Agency reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Agency will aggregate any such requesters and charge accordingly.

(3) *Effect of the Debt Collection Act of 1982* (Public Law 97-365). The Agency will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

(4) *Remittances.* (i) Remittances will be in U.S. Dollars in the form of either a personal check or bank draft drawn on a bank in the United States or a money order.

(ii) Remittances shall be made payable to the order of the U.S. Treasury and mailed to the Chief, Customer Outreach and Oversight Staff, at the address set forth in § 212.33(a) of this part.

### § 212.36 Denial of request for access to records.

(a) If it is determined that the Agency cannot comply with all or part of a request for records, the person making the request shall be immediately notified of the determination, the reasons for the determination, the name and title of each officer responsible for the denial, and the right of the person to appeal the adverse determination.

(b) The denial of a request for records may be made, initially, only by the Chief, Customer Outreach and Oversight Staff, or his/her designee.

## § 212.37

(c) (1) Any person who has been denied access to records pursuant to this section may appeal the relevant decision not later than thirty days after the date of the notification of denial or, in the case of a partial denial, not later than thirty days after the date the releasable documents are actually furnished to the person making the request, whichever is later. The appeal shall be in writing addressed to the Agency's FOIA Appeals Officer, who is:

The Director, Office of Administrative Services, Bureau for Management, Room 803, SA-2, Agency for International Development, 21st and Virginia Ave., N.W., Washington, D.C., 20523-0217.

(2) In order for the Agency to make a timely response to the appeal, both the text of the appeal and its envelope must be plainly marked "FOIA Appeal". The appeal must contain a reasonable description of the record sought and withheld, a copy of the initial decision to deny access and any other information that will enable the Appeals Officer to make the final decision.

## § 212.37 Procedures for agency consideration of appeals.

(a) Upon receipt of the appeal by the Appeals Officer, a maximum of twenty working days will normally be taken to decide the appeal. In unusual circumstances, as defined in § 212.34, the twenty working days may be extended by ten working days or by the number of days not used in the original denial of the request.

(b) If the appeal is granted, the person making the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees as set forth in § 212.35. If the appeal is denied in whole or part, the person making the request shall be immediately notified of the decisions and of the provisions for judicial review of the Agency's denial of the request.

(c) In the event a determination is not issued within the applicable time limit and the person making the request therefore chooses to sue the Agency, the Agency-level determination process shall nonetheless continue.

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(d) If an appeal not properly marked "FOIA Appeal" on the text of the appeal and/or envelope is thereby delayed in reaching the Appeals Officer, it will not be deemed received by the Appeals Officer until actually received by him/her. In such event, the person making the appeal will be furnished notice of the effective date of receipt.

## § 212.38 Predisclosure notification procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the Agency shall not be disclosed pursuant to a FOIA request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Confidential commercial information* means records provided to the Agency by a submitter that arguably contain material exempt from release under Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information to the Agency. The term "submitter" includes, but is not limited to, corporations, state governments and foreign governments.

(b) *Notice to submitters.* Whenever the Agency receives a FOIA request for confidential commercial information and, pursuant to paragraph (c) of this section, the submitter of such information is entitled to receive notice of that request, then the Agency shall promptly notify the submitter that it has received the request, unless such a notice is not required pursuant to paragraph (g) of this section. The notice shall be in writing and shall either describe the exact nature of the confidential commercial information requested or provide a copy of the records or portion of the records containing the confidential commercial information. The notice shall be addressed to the submitter and mailed, postage prepaid, first class mail, to the submitter's last known address. Where notice is required to be given to a voluminous number of submitters, in lieu of such a mailing the notice may be posted or